NO. 83038-0

SUPREME COURT OF THE STATE OF WASHINGTON

JERRY D. SMITH, as Personal Representative of the ESTATE OF BRENDA L. SMITH, Deceased, and on behalf of JERRY D. SMITH, RICHONA HILL, JEREMIAH HILL, and the ESTATE OF BRENDA L. SMITH,

Petitioners,

v.

ORTHOPEDICS INTERNATIONAL LIMITED, P.S.; and PAUL SCHWAEGLER, M.D.,

Respondents.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. ARGUMENT

A. Defense Counsel's Communication with Dr. Johansen's Lawyer During Trial Presented No Threat to the Physician-Patient Relationship Between Dr. Johansen and the Late Brenda Smith.

The Washington State Association for Justice Foundation (WSAJF), based upon the erroneous premise that any "contact" between defense counsel and counsel for a treating physician "unduly threatens the physician-patient relationship and should be deemed prejudicial to plaintiff's interests," *WSAJF Br. at 5*, seeks a vastly expanded *Loudon* rule[1] that would prohibit any such contact (including sharing of public information about a public trial) between defense counsel and counsel for a treating physician and would mandate exclusion of the treating physician's testimony or a new trial if any such contact were to occur. Implicit in WSAJF's argument, however, is the suggestion that personal injury defense lawyers and lawyers for treating physicians cannot be trusted to follow the rules, to act in good faith, or to conduct themselves ethically and professionally, and that any communication they may have with each other about a case is necessarily pernicious. Such denigration of the professionalism of lawyers who represent personal injury defendants and treating physicians is unwarranted and unfair. Even the *Loudon* rule prohibiting defense counsel from conducting ex parte interviews with a

[1] *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988).

plaintiff's treating physicians was adopted not because this Court considered such interviews evil or unethical, but to avoid the risk that a treating physician, unversed in the law, might reveal health care information about the patient that was irrelevant to the litigation. *Loudon v. Mhyre*, 110 Wn.2d 675, 677-79, 756 P.2d 138 (1988).

Neither the premise of WSAJF's argument nor WSAJF's proposed "bright line rule" is justified by the rationale of *Loudon* or the facts of this case. As the Court of Appeals correctly noted at the outset of its opinion:

> Prohibited ex parte contact as described in *Loudon v. Mhyre* does not apply to transmittal of public documents to an attorney representing a nonparty treating physician. The underlying public policy enunciated in *Loudon* was to protect the patient's privacy from release of any extraneous medical information not germane to the issue at trial. Here, there was no such risk as no information was sought in return from the physician and the information given to the witness was public information.

Smith v. Orthopedics Int'l, Ltd., P.S., 149 Wn. App. 337, 339, 203 P.3d 1066, *rev. granted*, 166 Wn.2d 1024 (2009).

Here, there was neither a violation of *Loudon* nor any ex parte "contact" that posed any threat to the physician-patient relationship between Dr. Johansen and Brenda Smith. For one thing, Mrs. Smith had been deceased for 32 months.[2] Even had she still been living, however, defense counsel communicated not with Dr. Johansen, but with Dr.

[2] Mrs. Smith died March 10, 2005. Ex. 89. Dr. Johansen testified at trial on November 14, 2007. 11/14 RP 9-97.

Johansen's lawyer; did not seek information from, but provided information to, Dr. Johansen's lawyer; and communicated information not about the patient's care, but about what was occurring in a public trial where Dr. Johansen would be testifying as a fact witness after having been deposed and without ever having been interviewed or "contacted" *ex parte* by defense counsel. Because the "contact" was one-way and through a lawyer, there was no risk that Dr. Johansen might blurt out some irrelevant and prejudicial privileged health care information about Mrs. Smith. WSAJF posits a "threat" that did not exist and demands a cure that would be worse than the phantom disease it diagnoses.

B. WSAJF's Proposed Expansion of the *Loudon* Rule Will Hardly Simplify the Trial of Personal Injury Lawsuits.

Contrary to WSAJF's suggestion, *WSAJF Br. at 18*, the Court would not be protecting litigants from more "post hoc" hearings by adopting a new "bright line rule" under which any "contact" between a defense lawyer and a treating physician or treating physician's lawyer, regardless of purpose or effect, will be deemed *per se* prejudicial to the plaintiff and give the plaintiff the right to prevent the physician from testifying or to obtain a new trial. Rather, such a rule will simply encourage the plaintiffs' bar to try, after defense verdicts or unfavorable trial developments, to ferret out and cry foul about any perceived

"contact" defense counsel can be characterized as having had with a treating physician or a treating physician's lawyer. There will be motions for show-cause or evidentiary hearings because a treating physician (or the treating physician's lawyer) and defense counsel attended and chatted with each other at a high school basketball game, a charity fundraiser, or some other event. Lawyers who defend personal injury cases and have friends who are doctors (or friends who are lawyers representing doctors) will have "contact" with those friends at risk of being dragged before a court to explain that "contact." And it won't stop there. The next step will be for the plaintiffs' lawyers to insist that lawyers for co-defendant treating physicians cannot have contact with each other about the case, or even to insist that co-defendant treating physicians be forced to account for any "contact" they may have with each other as professional colleagues.[3] Personal injury defendants, treating physicians, and their lawyers should be able to live their lives without such policing, and co-defendants, even if they were or are treating physicians, and their lawyers should be entitled to work collaboratively in defending tort claims.

[3] And, as more fully discussed in the Brief of Amicus Curiae Washington State Hospital Association, MultiCare Health System, Group Health Cooperative, and Physicians Insurance A Mutual Company, adoption of petitioner's or WSAJF's expanded *Loudon* rule will only lead to more requests by the plaintiff bar to prohibit individual health care providers employed by an institutional medical malpractice defendant from conferring with counsel for their employer to convey facts pertaining to the treatment at issue and to enable the defendant employer and its counsel to fully evaluate and defend the plaintiff's claim.

Steps taken to protect the physician-patient relationship should be commensurate with risks to that relationship. "Protecting the physician-patient relationship" should not be an excuse for rules that are really designed to hamstring defendants, treating physicians being called to testify as fact witnesses, and their lawyers.

Here, defense counsel did nothing about which the plaintiff, or his disappointed counsel, can rightfully complain. All he did was provide information about the trial (not the patient) *to the lawyer* for a surgeon who was going to testify at trial. He provided the information to enable the surgeon to prepare to testify about operations he had performed nearly four years earlier and about which he had been deposed 15 months earlier.

Loudon is more than broad enough already. *Loudon* applies not only to primary care physicians, psychiatrists, gynecologists, urologists, and other specialists who may well have information a patient might consider embarrassing or too private to disclose absent a court order, but also to physicians across the board, and thus precludes defense counsel from having informal ex parte contact about the patient with practitioners, such as surgeons, radiologists, and pathologists, who typically have little or no interactive contact with the patient and who therefore acquire no confidences. *Loudon* is based on concern about inadvertent disclosure by physicians of *irrelevant* health care information, even though most

personal injury claimants seek damages for such a broad array of physical, mental, and emotional harms as to make nothing in their health histories irrelevant. *Loudon* applies not only to personal injury lawsuits but to wrongful death cases, even though the Court's stated concern about undermining the physician-patient relationship is much weaker, if at all valid, once the patient is no longer alive. And, *Loudon* was decided 22 years ago, before the enactment of statutes, such as RCW 70.02.060(2) and the federal "HIPAA" statute,[4] and implementing privacy rules, *see* 45 C.F.R. § 164.502(a), that result in physicians having to be much more focused on, and undergoing much more continuing education about, patient confidentiality than they may have prior to 1988.

The communication that occurred here between defense counsel and Dr. Johansen's lawyer was not wrong, did not affect the trial (as even WSAJF implicitly concedes), and does not need a new rule to prevent or punish. There simply is no need to expand *Loudon* to prevent what happened here.

C. There Is No Need to Expand *Loudon* to Make It "Consistent" with the Statutes Appended to WSAJF's Brief.

Through footnotes 7 and 9 and the appendices to its brief, WSAJF suggests that the Court should expand *Loudon* to make it "consistent" with RCW 51.52.063 and/or 70.02.005 and .060. But RCW 51.52.063 is

[4] The Health Insurance Portability and Accountability Act of 1996, P.L. 104-191.

concerned not with "contact" or "communication" *per se*, but rather with "contact *to discuss the issues in question in the appeal*" of a worker's compensation case, RCW 51.52.063(1)(a) and (3)(a), with "communication *regarding the worker's treatment needs and the provider's treatment plan [etc.]*," RCW 51.52.063(1)(b) and (3)(b), and with "communicat[ion] . . . *concerning the issues in question in the appeal*," RCW 51.52.063(1)(c) and (3)(c). [Emphases supplied.] RCW 70.02.005 sets forth legislative findings concerning access to, and exchange, use, and disclosure of "health care information." RCW 70.02.060 prescribes procedures relating to "a discovery request or compulsory process on a health care provider *for health care information*," and prohibits health care providers from "disclos[ing] *the health care information sought*" absent written consent of the patient or compliance by the requestor with the prescribed procedures.

In other words, to make *Loudon* "consistent" with these statutes, nothing needs to be done, because none of the statutes reflects concern about "contact" between a defense lawyer and the lawyer for a treating physician in which no patient's health care information is sought or divulged, and which does nothing more than apprise the treating physician's lawyer (and if shared with him by his lawyer, the treating physician) of how the *plaintiff's* trial brief has summarized the pertinent

facts, what a plaintiff's expert said in public trial testimony that was critical of the care the treating physician had provided, and what kinds of questions defense counsel might ask the treating surgeon based on the deposition testimony the treating physician had given 15 months earlier about care he provided more than three years ago.

D. A Personal Injury Plaintiff May Wish to Have, But Does Not Have a Right to Have, Treating Physicians with Unhelpful Testimony Come Unprepared to Testify at Trial.

Fifteen months before the trial in this case, Dr. Johansen had duly been deposed by plaintiff's counsel, not interviewed *ex parte* by defense counsel, concerning the care he provided to the late Mrs. Smith. At that deposition, Dr. Johansen gave testimony that plaintiff's counsel considered unhelpful to plaintiff's case. At trial, Dr. Johansen was being called as a witness only by the defense. Neither the substance of Dr. Johansen's testimony helpful to the defense and unhelpful to the plaintiff, nor the fact that the defense planned to call him at trial, was any secret.

No doubt, plaintiff's counsel would have preferred that Dr. Johansen not testify at trial, or at least that Dr. Johansen appeared more unprepared to testify than he did when called at trial by the defense. But neither WSAJF nor the plaintiff cites any aspect of Dr. Johansen's trial testimony that differed materially from his deposition testimony. The fact that plaintiff would have like to have prevented Dr. Johansen from

testifying at trial is not a reason for this Court to punish defendants because defense counsel conveyed *to the lawyer for* Dr. Johansen information from a public trial that might have made it easier for Dr. Johansen and his lawyer to understand the context of the trial, refresh Dr. Johansen's recollection, or help Dr. Johansen prepare to testify more easily, or make a better impression on the jury than he otherwise might have if kept ignorant of trial developments. Neither WSAJF nor the plaintiff offers any principled reason why the mere fact that a fact witness is a treating physician means that the witness's lawyer can not obtain or receive information about the case from defense counsel, but must rely solely on the forthrightness and "forthcomingness" of plaintiff's counsel for any information about the case that might prove helpful in representing and preparing his or her fact witness client to testify.

II. CONCLUSION

Loudon is about keeping defense lawyers from getting private information *from* treating physicians about the patient's health; it is not about, and should not *be* about, keeping a defense lawyer (or anyone else) from providing public information *to* a treating physician's lawyer about a trial at which the treating physician is about to testify. When it comes to a case like this one, where the treating physician is a surgeon and the claim is for the patient's wrongful death, *Loudon* already is overprotective of the

interests it was designed to protect. The communication defense counsel had with Dr. Johansen's lawyer neither undermined nor threatened the physician-patient relationship between the late Mrs. Smith and Dr. Johansen. Even if the physician had been a primary care doctor and the plaintiff were still alive, nothing defense counsel did in communicating with Dr. Johansen's lawyer violated the letter or spirit of *Loudon*. No prejudice occurred; no remedy is needed; and no new expansive "bright line rule" should be promulgated to hamstring personal injury defendants, treating physicians called as fact witnesses, or their lawyers.

RESPECTFULLY SUBMITTED this 14th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 14th day of June, 2010, I caused a true and correct copy of the foregoing document, "Respondents' Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation," to be delivered in the manner indicated below to the following counsel of record:

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